



**The Comptroller General
of the United States**

Washington, D.C. 20548

Decision

Matter of: Truetech, Inc.--Reconsideration

File: B-232407.2

Date: November 16, 1988

DIGEST

1. Protester challenging contracting officer's failure to file size status protest with Small Business Administration was not prejudiced since protester's size status protest was not timely filed with the contracting officer and therefore would not have an affect on the instant procurement.
2. Whether firm selected for award can perform a contract within subcontracting limitations is a matter of responsibility, evidence of which can be provided anytime before award.

DECISION

Truetech, Inc., requests reconsideration of our decision in Truetech, Inc., B-232407, Sept. 20, 1988, 88-2 CPD ¶ 270, concerning the award of a contract under invitation for bids (IFB) No. DLA400-88-B-1168 issued by the Defense Logistics Agency for chlorination kits. We affirm the dismissal.

In its original protest, Truetech alleged that the apparent low bidder, Bioscientific Corporation, did not have the facilities, equipment or managerial and technical ability to do the work required by the contract and would therefore have to subcontract over 50 percent of the cost of the work. The procurement was a small business set-aside, and Truetech argued that the award to Bioscientific would violate Federal Acquisition Regulation (FAR) § 52.219-14(b), which requires that the company awarded a supply contract under a small business set-aside must perform at least 50 percent of the cost of manufacturing the supplies itself.

Our decision held that the agency must determine that Bioscientific had the ability to perform the contract before making an award and we would not review an affirmative

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responsibility determination except in circumstances not applicable in this case.

In its request for reconsideration, Truetechn argues that its protest challenged the eligibility of Bioscientific under the small business set-aside, not the contracting officer's responsibility determination. Truetechn also contends that the contracting officer should have sought guidance from the Small Business Administration (SBA) before concluding that Bioscientific was eligible for an award under the set-aside.

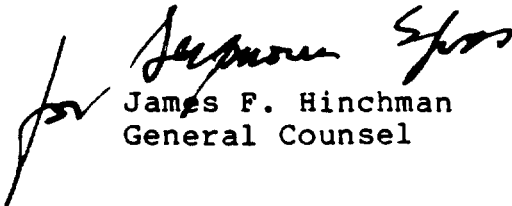
With regard to Bioscientific's eligibility as a small business, Truetechn had protested Bioscientific's status under the set-aside to the contracting officer on June 10, 1988. Under FAR § 19.302, the contracting officer should have forwarded the protest to the SBA. Instead, the contracting officer denied the protest on August 12. Truetechn was not prejudiced by the contracting officer's omission, however, because Truetechn's June 10 protest was not timely filed and therefore would not have affected this solicitation. FAR § 19.302(d) states that in order to affect a specific solicitation, a protest must be received by the contracting officer by the close of business of the 5th day after bid opening. An untimely protest must still be forwarded to SBA, but only for consideration in any future procurements. FAR § 19.302(j). Truetechn's June 10 protest was filed long after the March 31 bid opening. Therefore, the contracting officer's failure to forward Truetechn's size status protest to SBA did not have any affect on the award in this procurement.

To the extent Truetechn argues the contracting officer should himself have questioned Bioscientific's size status, the contracting officer's determination that Bioscientific could comply with the subcontracting limitation concerns Bioscientific's responsibility, and thus involves a wide degree of discretion and business judgment. See Diversified Computer Consultants--Request for Reconsideration, B-230313.3, Sept. 20, 1988, 88-2 CPD ¶ 265. The record shows that the contracting officer was satisfied by the pre-award survey that Bioscientific had the ability to comply with the subcontracting limitation by the time of award. Since the matter is one of responsibility, evidence of responsibility may be provided after bid opening anytime prior to award. Noslot Cleaning Services, Inc., B-228538, June 21, 1988, 88-1 CPD ¶ 58.

Truetechn also argues that the solicitation was defective because the agency did not include FAR § 52.219-14, the clause requiring the contractor to perform at least 50 percent of the cost of manufacturing the supplies.

Although Truetech states that it learned of this omission only when it received the agency's report on its initial protest on October 3, 1988, the protester knew or should have known of the omission when it received the IFB or at the latest when it protested to the agency on June 10, and therefore should have known that the clause had not been included in the solicitation at least by that time. Accordingly, this aspect of the request for reconsideration is untimely since it was not raised until October 6, 1988. 4 C.F.R. § 21.2(a)(2) (1988). Moreover, the absence of the clause appears to have had no material affect on the procurement, since the awardee intends to comply with the subcontracting limitation.

Our prior decision is affirmed.

James F. Hinchman
General Counsel